THE NEW GOVERNMENT REGULATION OF BUSINESS

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Shall the new industrial expansion be helped or blocked by our public policy of regulation?

Government is now a silent partner in every business. The great weight and influence of this member of the firm can be thrown either for or against the concern. There are certain marked and definite changes in our policy which show that, all gloomy prophecies to the contrary, our regulative system is gradually unfolding along constructive lines and that in the era which we are now entering, the reasonable interests and demands of both *investor* and *consumer* may be realized. The most noteworthy of these changes are:

1. The turning of government attention and effort from prohibitive litigation towards regulation by federal commissions and administrative bodies.

2. The distinction in the courts between combines which are large and those which are guilty of crooked practices in competition —the dissolution of these latter, not because they are combines, but because their methods are illicit.

3. Our states have now almost universally grasped the public service commission idea and are abandoning attempts to regulate by legislative enactment covering the details of business.

4. Notable progress is being made in the effort to hasten final decisions by all authorities, both commissions and courts, of disputed points in regulative law. We are trying to give to both sides, the producer and the customer, the advantages of early decisions without delay.

5. We are just awakening to the fairly important fact that federal rather than state regulation of business is the only safe and effective plan for the future. All the most essential points of national regulation must be placed in national authorities. Let us consider the advantages which these changes bring to the American productive machinery.

1. Commission regulation is supplanting that of the courts.

Why is this a step forward? No one can have contemplated the long array of judicial decisions under our anti-trust laws without feeling that we were in some dim sense struggling against the human tendency to coöperate by team work, and that sooner or later our courts must find an interpretation of the law, or our legislators must enact a new series of statutes which would recognize this fundamental human tendency. One of the greatest misfortunes that has befallen the anti-trust campaign has been that the monopolist, the price manipulator, the trade destroyer and the commercial pirate have been able to escape when prosecuted, on the plea that the law was forbidding an economic growth. It would be highly interesting and serviceable but probably illegal under the libel laws to point out numerous recent instances in which business piracies of this kind have successfully escaped punishment because either judge or jury opened their minds to the plea that the anti-trust laws were uneconomic. Because of this feeling the small competitor has been destroyed with impunity and the consumer has been mulcted of hundreds of millions of dollars without redress in the courts. Even the mighty machinery of the federal government itself when set in motion by an injunction has failed to prevent a new lining up of the enjoined combines. The criminal prosecution and the injunction have been a disappointment to us. They are effective only against the little man. Their influence and value are in inverse proportion to the size of the combine and its power for destruction. Yet they have had a marked effect in unsettling business and raising doubts and uncertainties in the public mind. While not protecting the consumer, they have greatly injured the investor. We need some *permissive* authority, some machinery which will hasten, clarify and make definite the settlement of fixed principles of regulation—some plan which will offer a more continuous and constant system of control. The Sherman act has in part succeeded and despite all criticisms it is still a strong bulwark of protection to the consumer and small producer in many fields, but either the law itself or its administration has failed in one important respect—it has thrown the entire burden of overseeing and superintending its enforcement upon the courts. The courts are not administrative supervisory bodies, nor can they ever become such. They are not constantly in session. Their calendars are more or less fixed. Their procedure is likewise more rigid than that of an administrative

body. They have not the facilities for investigation, research and specialized study of the field of regulative law. In a word, they are not administrative and cannot be made so without overturning their essential judicial functions. When a court hears a criminal prosecution for violation of the anti-trust acts, and sentences or acquits the accused, its work is done. When it grants or refuses an injunction to prevent further violation of such laws, it has completed its function. It may later investigate to see if the injunction has been violated, it may shorten the sentence of the convicted, but it does not and cannot regulate from month to month. Nor can it issue general rules to apply and enforce a law as is constantly done by an administrative body. Yet it is only this constant and continuous type of regulation which allows or permits, revises, corrects, expands, interprets and enforces, that we can safely use in our present conditions of business. Can we imagine the courts of the United States regulating our railway systems or determining in the many thousands of cases which arise, what is a "reasonable rate" under the railway act? Can we imagine our courts establishing, even after decades of decisions and precedents, the various principles which are now being set forth in a few clear, explicit rules to enforce the pure food and drug act, by the administrative board which has charge of this question? For nearly twenty-five years the Sherman act has been on the statute book and the courts have been industriously seeking to establish the meaning of the words "restraint of trade." Yet over twelve hundred large combinations with nearly two billion capital still exist in doubtful legality. Can we picture our state courts likewise seeking through another generation to determine "reasonable" rates for gas, telephone, electric light, water and railway companies? The commission idea has gained such wide acceptance in federal regulation because it presents four pronounced advantages:

(a) Constant accessibility—all commissions are required by law to be permanently open for business.

(b) Expert service—all our commissions employ a staff of skilled investigators to bring in the facts. This independent impartial testimony from an unbiased point of view is invaluable.

(c) The commission offers a cheap, quick and informal procedure. This our courts cannot or will not do since they are held in leash by ancient custom and tradition.

(d) The commissions, as we have just seen, not only decide individual cases but issue sets of *regulations and rules* to execute the law. In short, they decide in advance most of the disputes which might come to them and apply the general principles of the law to vast numbers of cases to prevent disputes. This is probably their highest service and too little attention has been paid to it by the public. Courts decide, while commissions not only decide but prevent. If our courts could fulfill all these invaluable functions, we should have no need for commissions.

The highly promising trend towards administrative commissions in the national government is now well marked. The railway act is enforced by the commerce commission. The pure food and drugs act of 1906 has revolutionized this field of manufacture. Remarkably few heavy fines and penalties have been levied under it. A vast number of fine points of distinction between legal and illegal labels, methods of preparation, ingredients, etc., have arisen. Yet the law today is well cleared up on all essential points in less than a decade after its passage. It is administered chiefly by scientists in a chemical laboratory, by inspectors gathering samples and by *rules and regulations* issued by the secretary of agriculture, secretary of the treasury, and the secretary of commerce, acting as a joint board. Unfair competition in all forms of interstate business is forbidden by the act of September 26, 1914. Its enforcement is entrusted chiefly to the new Federal Trade Commission which has power to decide individual cases of unfair competition and, what is far more important, to make rules and regulations carrying out the principles of the act. The producer wants to know where he stands. Many have complained that under the old laws they had no clear idea of the legality of their acts nor did the competitor know his rights. This doubt and uncertainty, the administrative rulings of the commission speedily remove. Most interesting is the fact that the new laws do not regulate details. The commerce act says "discrimination," "reasonable rates"; the food and drugs act says "adulteration" and "misbranding"; the Trade Commission Law says "unfair competition." Every one of these phrases is fully as vague and indefinite as the term "restraint of trade" in the Sherman act. Yet what a remarkable difference in their enforcement. The new laws and the commerce act provide that the administrative commission shall determine by its rules and regulations the exact

meaning of "discrimination," "reasonableness," "adulteration," "misbranding," "unfair competition." It is this that gives flexibility, clearness and dispatch to the new system of business regulation.

2. The judicial mind by an effort, which, though arduous is none the less deserving of recognition, has begun to distinguish between the good and the bad trust. It has been greatly hampered in this effort by the absence of that administrative power which we have seen gives so much life and point to commission rules. Yet the courts have done their best to separate the sheep from the goats by the justly celebrated but widely misunderstood "rule of reason." When this rule was first proposed by Justice White in the dissenting minority opinion in the trans-Missouri freight association case, it was answered by the majority that the words "Every combination in restraint of trade," as used in the Sherman act, meant "Every," and that it was not for a court to insert in the law a proviso permitting reasonable restraint when the law-maker himself had refused to do so. Fourteen years later Justice White, now become chief of the supreme bench, again announced his doctrine and this time carried with him a majority of the court in the Standard Oil and Tobacco cases. The rule, shorn of its complexities, is simply that a combination when accused of restraint of trade will be judged by its purpose and effect; not by the accident of form nor the circumstance of size. Translated into the language of the layman, the rule means that since all coöperation or team work in industry involves an agreement by the members of the team not to compete with each other, but to coöperate, there must be some difference between reasonable and unreasonable restraint of trade. It is the unreasonable which the law forbids while the reasonable is to be permitted under the new rule. The best application of the rule of reason is seen in the United States *v.* St. Louis Terminal Association, 224 U. S. 383, decided in 1912. Here an interesting engineering problem had come in contact with the federal trust laws. The great breadth of the Mississippi River, the high banks on the St. Louis side, and the expense of bridging and tunnelling these two natural obstacles to entrance, had led to a combination of the lines entering St. Louis in a terminal association, which owned and operated all the approaches to the city. This association under the early tutelage of Jay Gould had placed in its by-laws a number of provisions de-

signed to keep out competitive lines in the future. Among these were clauses providing that the lines forming the terminal association would not construct other entrances to St. Louis than those owned by the association and that they would allow no new line to enter the association without unanimous consent. These provisions combined with the prohibitive expense of constructing any new independent entrances gave to the association an air-tight monopoly. The federal department of justice asked for a dissolution of the combine as a serious restraint of trade and in the resulting suit the court gave the most striking example of the rule of reason thus far seen in our regulative laws. It divided the combination into two separate features. First, the union of all the terminal facilities of the city under the control of the association and second, the restrictive and oppressive clauses by which outsiders were prevented from joining the association. The first, the union of facilities, was an economic and reasonable arrangement. It was not contrary to the spirit of the law even though it necessarily involved a cooperation between railways that were authorized competitors. The physical conformation of the territory round about the city which made competitive entrances impossible was heavily emphasized by the court and from it the court concluded that a union of competitors was essential and legal. But the second feature, involved in the restrictive clauses in the by-laws, clearly showed a purpose of oppression and restraint upon outside lines and such restraint had actually resulted. It was held to be illegal. The association was ordered, not to dissolve, but to repeal these violations of the law and to supplant them with reasonable rules under which other railways could both enter the association or enjoy upon reasonable terms its facilities for entrance.

If this decision is followed and the rule of reason extended, we shall cease to prosecute combines *because they are combines*, or because of their size, while we shall still continue to visit the penalties of the law upon those destructive and oppressive practices which are intended to wipe out the competitor or exploit the consumer.

3. The states have caught the spirit of administrative or commission regulation from the federal government. The few experimental commissions which were first established on the model of the national commerce body, have now been copied in thirty-three states and the District of Columbia. This system is not perfect.

Contrary to general expectations it has not afforded the consumer the full protection that was hoped, but one great service it has undoubtedly rendered. It has removed the regulation of public service companies from the field of legislative and partisan politics. We hear less of two cent per mile rate laws and more of methods of accounting, improvements in service, etc. Many of the state commissions, it is true, have taken it as their special mission in life to prevent municipal ownership of gas, electric light, and other public utilities. In order to do this, whenever called upon to appraise local utility plants which were about to be bought by the cities, the commissions have placed remarkable and inflated values upon such plants and thereby made it impossible for the cities to purchase. Whether the end toward which they aimed was good or not the method has been regrettable and has not stimulated public confidence in commission appraisals, but this must not blind us to the very real services which the commissions have performed.

4. We are shortening the delays in hearings and in the decision of law suits in public regulation. Until recently it has been the custom to appeal from decisions of the federal or state commissions to the courts, to hold up final decisions of the courts themselves, until such a dispute frequently, if not usually, required from five to seven years to decide. The friends of the commission plan now realize that such delays must be avoided in the future, since the very principle of commission regulation is at stake. No better means of destroying the new system could be found than to allow it to exist nominally while in practice suspending the commission rulings by long drawn out appeals. The friends of the new plan have therefore bent their energies toward shortening the appeal procedure and dropping out as many of the steps in this procedure as possible. The Interstate Commerce Commission rulings may be appealed to the federal courts but such appeals do not go to a district court; they are now made direct to the circuit courts of appeals, as are also the appeals from decisions of the new Federal Trade Commission. Many of the newer state laws provide that appeals from the public service commission shall go direct to the supreme court of the state. While this is not constitutional in all the states it is so in many and allows of a marked saving of time for both parties. After all is said, we must judge the new methods of regulation not by their aims and hopes but by their output, and it is

vital to their success that both producer and consumer shall have an early settlement of all essential questions in dispute.

5. The question, shall we have federal or state regulation?—is now rapidly pushing into the foreground as one of the prime issues in the successful working out of our regulative policy. The federal system has won a notable victory in the Shreveport decision and in order to realize the progress which this decision marks let us contrast it with the opinion in the Minnesota rate case. The real principle involved in these two opinions is extremely simple despite the complicated circumstances in which it was wrapped up. In the Minnesota rate case, Simpson *v.* Sheppard, 230 U. S. 352, the state authorities in Minnesota had reduced materially the freight rates to be charged within the state. The railways found that this affected the charges which they could make on interstate traffic passing through the state as well as on local traffic, because shippers whose freight was passing through Minnesota to other states could easily claim the advantage of the low rate within the state. In brief, the local Minnesota rate change immediately reduced the through rates on national traffic—"interstate trade." The railways accordingly claimed that the law was unconstitutional since it was in substance and effect a state regulation of interstate trade, and only the national government could legally regulate such national traffic. But the supreme court overruled this objection and upheld the state's regulation on the ground that while it did undoubtedly have the effect of influencing interstate rates its real purpose was to control local rates and this the state had a clear and undisputed right to do under the constitution. This decision seemed to destroy at one blow the freedom of national railway traffic from local interference and subjected such trade to all the petty, various and conflicting rules of the states through which it passed. It was indeed an ominous ruling which seriously undermined the prosperity of all the interstate carriers. But in the following year federal control was reasserted and the necessity for it clearly shown in the celebrated Shreveport case, Houston etc. Railway *v.* United States, 233 U. S. 342. Here the state authorities of Texas and the railways under their jurisdiction had established a system of local rates within the state which kept out trade from the commonwealth of Louisiana. Shreveport, La., was on the boundary line. It wished to become a distributing center and its merchants to this end sought

freight rates from Shreveport into the state of Texas which would enable them to send goods into large areas of that state and compete actively with the Texas distributing cities. The local railway rates, however, were so arranged from the boundary of Texas into the disputed markets as to discourage such outside competition while the local rates from the Texas cities to the disputed markets were kept at a lower point to favor the merchants of the Texas cities. Could the federal authorities intervene in such a situation? The Shreveport merchants appealed to the Interstate Commerce Commission for a through (interstate) rate which would enable them to compete in the territory in question. The Commission ruled in their favor, ordering the railways to remove the discrimination against interstate trade by readjusting the relation between interstate and local rates, that is, the railways should either lower the interstate rate to the same proportinate level as the local rate, or raise the local rate to the same proportionate level as that on interstate traffic. At once the railways and the state authorities appealed from this ruling, claiming it to be an infraction of the state's authority to fix its own local rates as it pleased. Basing their appeal on the Minnesota rate decision they maintained that since the state could determine the rates to be charged in local business within its boundaries, the federal authorities could not interfere with this action. The court upheld the national commission and declared that that body was authorized to regulate national railway rates. Its province was to protect and further interstate trade and in doing this it could remove any discrimination or barrier erected against such trade by no matter what local authority. The court explained further its opinion in the Minnesota case by saying that all state action which influences directly or indirectly interstate trade was only upon the suffrance of federal authorities. While a state law might be allowed to stand *in the absence of Federal action*, in the moment the Federal Government acted the state power ceased. This clear unequivocal definition of the national control has reëstablished, not the freedom, but the possibility of freedom from state interference, *if Congress will act.* Contrary to the belief in certain business circles we need not less regulation but more, and it must be by the federal government.

While all the above-mentioned changes in our regulative system are highly encouraging because they show the tendency to

bring policy into harmony with actual conditions, there are still needed two other important, even vital, improvements in this policy, both of which fortunately lie along the lines of our present growth and conform in principle to the ideas above described. These are a change in the powers of the trade commission and the further enlargement of national at the expense of state regulative control.

Our regulative laws need greater elasticity and flexibility. These qualities can only be given in the administration of the law. It is hopeless to attempt to secure flexibility by court action for reasons which we have already examined. We must rely to an ever greater extent upon administrative commissions and boards, particularly in the federal government, to apply the general principles of our regulative acts to the manifold and various conditions of national trade. The best instance of this can be seen in the much discussed and really important question of price protection in retail trade. Shall the manufacturer have the right to arrange with retailers that they shall sell only at a certain figure? On this point volumes have been written. The supreme court has covered it in two leading decisions: Bauer *v.* O'Donnell, 229 U. S. 1, and Miles Medical Co., *v.* Park Drug. Co., 220 U. S. 373. In these and other cases it has declared that price-fixing by agreement in interstate trade is a violation of the Sherman act because it is an agreement not to compete in prices but to fix a single price. An agreement not to compete is a restraint of trade. Accordingly the whole fabric and structure of price protection by agreement is illegal. There is no flexibility in this principle. The good and bad price-fixing agreements alike, the extortionate and the justifiable are both condemned. We need some administrative investigation and weighing of each agreement so that it can be condemned or approved in each case according to its purpose and effects. There is only one way of securing this. The powers of the federal trade commission should be enlarged to approve any agreement which would otherwise fall under the ban of the trust laws but which on careful inspection proves to be beneficial or harmless. Its present authority is too exclusively negative and prohibitive in character. It may forbid and investigate and deny but its *permissive* power is too limited. For example, Section 11 of the commission act provides that

nothing contained in this act shall be construed to prevent or interfere with the enforcement of the provisions of the anti-trust acts or the acts to regulate commerce, nor shall anything contained in the act be construed to alter, modify, or repeal the said anti-trust acts or the acts to regulate commerce or any part or parts thereof.

This makes it clear that the commission cannot legalize any agreement. Section 7, of the Clayton law, dealing with holding corporations and the union of competitive companies, declares that "nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the anti-trust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided." And Section 11, of the same act, after outlining the powers of the commission to prevent unfair competition, again limits the commission's authority by declaring that "no order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the anti-trust acts." We have therefore in these two statutes several clearly worded clauses which emphatically reassert all the provisions of the Sherman act and prevent the new trade commission from using its power to apply the law in an effective and flexible way. Yet we have seen that the great advantage to be gained by such a commission is precisely this sound modern view of the law which would distinguish between various types of combinations in restraint of trade, allowing those which are beneficial to stand and suppressing those which are harmful. If the commission had this power it would solve the problem far better than a legislative control with its inflexible prohibitions and penalties.

There is no reason why our government should fix prices except in public service industries but there is every reason why it should not condemn indiscriminately all agreements to fix prices. It is feared by many that such an enlargement of the commission's power might fasten upon the country, by legal action, a scale of artificially high prices and might continue in existence with a guaranteed profit, the inefficient producer or merchant who refuses to adopt modern ideas and processes. But of this we need have no fear if our experience with the Interstate Commerce Commission is a safe guide. Rather would the tendency of public opinion compel an administrative body to keep prices at a reasonable level and this

pressure would in itself stimulate the producer to make use of every new and improved method in manufacture and merchandise. Such a change would give a much broader scale of liberty to interstate companies and would above all provide a much clearer definition of what they can and what they cannot do under the law. It offers the further advantage of being directly in line with our past administrative experience and precedents.

Finally the enlargement of the federal, at the expense of the state jurisdiction over national trade, is of equal, if not greater importance. Our supreme court today allows the states both to tax and to regulate interstate companies to an extent that was never intended by the constitution and in a way which seriously burdens and obstructs national business. Originally the federal courts resolutely defended national trade from state levies of this kind. In such statesman-like decisions as in Brown *v.* Maryland, Chief Justice Marshall and later his successors, in McCall *v.* California, Galveston Railway *v.* Texas and similar cases, held that the state must not interfere with national commerce because the regulative power over national trade had been given to Congress alone. In fact as late as 1909, in Western Union *v.* Kansas, 216 U. S. 1, the court declared that a state tax on the total capital stock of a *national* carrier was a burden on the *national* business of the carrier and therefore a violation of that clause which gave to Congress the regulation of national trade. These rulings all carried out the manifest intent of the clause in question but many of them had been rendered by a divided court, and nearly all the most important decisions were made by a vote of five to four.

The fluctuating majorities of the court have usually turned in all essential points against protection of interstate business and we have a series of rulings which threaten to modify if not repeal the protection of the commerce clause. A state may tax all the property located within the state belonging to an interstate carrier—Thompson *v.* Union Pacific, 9 Wallace 579. It may tax even the gross receipts within the state, from all sources, of an interstate carrier, provided it excuses the carrier from other taxes—U. S. Express Co., *v.* Minnesota, 223 U. S. 335. A state may even tax its share of the capital stock of an interstate carrier—Pullman Co. *v.* Pennsylvania, 141 U. S. 18. The state's share in this case is measured by its proportion of the total mileage covered by the

company's cars. And since the capital stock includes the value of the franchise or right to engage in interstate trading, the state may be said to have the right to tax that franchise. If the property, the gross receipts, the capital stock including the franchise of a carrier may be taxed, what is left?

And, when we come to those interstate companies which are not common carriers but are engaged in manufacturing and trading we find their lot indeed to be an unenviable one. The common carrier may at least construct its lines and transact its interstate business regardless of the state's wishes but other commercial companies, industrial or trading concerns, cannot transact any general business within the state without its consent. They may ship their goods in from outside, they may send their traveling salesmen in to take orders and in all such operations may claim the exemptions of interstate commerce but the moment they open an office for general business within a commonwealth, they are subject to its rules, regulations and taxes and may even be totally excluded should it see fit. So for example, The Horn Silver Mining Company, a Utah corporation with ten million dollars of capital, had been taxed in Utah where it was incorporated. Much of its property lay in Illinois and there it was taxed. But in an evil hour the company decided to enter the state of New York for the transaction of local business. For the privilege of opening a local office it was taxed upon its *entire capital stock*, the amount of the levy being thirty thousand dollars. It protested, appealing finally to the federal supreme court and claiming that as a company engaged in interstate business it could enter any state and if taxes were levied by a state for the privilege of transacting local business within its boundaries, such taxation must fall upon the local business for which they were charged and must not be levied upon the total national business of the company. But to this objection the court made answer that every state possessed absolute, complete control over the local business transacted within its bounds, just as Congress controlled interstate trade. No outside corporation could claim the right to engage in local trade against the will of the state. Accordingly if a state wished to keep out such a company absolutely it could do so, but the right to exclude carried with it also the right to admit under conditions, and one of these conditions might be the payment of a license or permit fee for the privilege of transacting local busi-

ness. If the Horn Mining Company wished to engage solely in interstate trading it might do so without paying such a license but when it opened a general office for all kinds of trade within New York State, it must first secure the permission of the state authorities. The fact that these authorities measure their license fee by the total capital stock of the company should not be regarded as proof that they were taxing interstate commerce, they were only measuring their tax by the amount of the capital stock and the levy really was a burden upon local business rather than national trade. This decision is not a temporary, freakish aberration from the general policy of the court. It is one of a long line of precedents by which the supreme court has so completely subjected national companies to state taxation that they are now obliged to evade such taxes by forming local companies with small capital to transact their local business. The stock of these local companies is owned by the parent concern. In order to secure the protection which the constitution guaranteed them they are obliged to resort to shifty expedients.

This brief survey shows how urgently we need a strong assertion of national sovereignty over national trade. State regulations and state taxes on this trade should be immediately superseded by federal action. We must remember that in all of its decisions upholding state rules on interstate commerce the supreme court has attached the proviso that such rules would be invalid *if Congress should act.* What we need, therefore, is action by the national government which will establish national rules to displace such interference, the further assertion by Congress of its regulative power over national trade to exempt both the carriers and other interstate companies from local taxation. The imposition by Congress of a national tax on such companies would be of invaluable assistance to the channels of national business. We should then have our interstate trade established on the sound basis of complete freedom from local interference and subject only to that flexible, adaptable and elastic regulation of the national administrative commissions which has been described. By this means only can we provide a constructive policy of regulation.